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Supreme Court of the United States
OCTOBER TERM, 1986

DRUMMOND COMPANY, INC.,
Petitioner,

v.

DONALD P. HODEL, SECRETARY
DEPARTMENT OF THE INTERIOR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE NATIONAL COAL ASSOCIATION AND THE MINING AND RECLAMATION COUNCIL OF AMERICA, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF THE NATIONAL COAL ASSOCIATION AND THE MINING AND RECLAMATION COUNCIL OF AMERICA, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amici National Coal Association and Mining and Reclamation Council of America respectfully submit that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered herein on July 22, 1986 in *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986), should be granted.

Both Petitioner and Respondent in this case have consented to National Coal Association and the Mining and Reclamation Council of America filing this brief as *amici curiae.* The consents have been filed with the Clerk.

INTEREST OF AMICI NATIONAL COAL ASSOCIATION AND THE MINING AND RECLAMATION COUNCIL OF AMERICA

The National Coal Association ("NCA") and the Mining and Reclamation Council of America ("MARC") are associations with hundreds of members, including coal producers, coal sellers, and thirty-two state and regional associations. NCA and MARC, through their membership and affiliated associations, represent over ninety percent of U.S. coal production and NCA and MARC producer members have mining operations in Eastern, Midwestern, and Western states. NCA and MARC producer members range from companies mining several thousand tons of coal yearly to large corporations producing millions of tons of coal annually.

At issue in this case are revised regulations promulgated in 1982[1] by the Secretary of the Interior ("Secretary") governing the imposition and collection of reclamation fees under the Surface Mining Control and Reclamation Act ("SMCRA" or "the Act"), 30 U.S.C. § 1201-1328 (1982), which authorize the imposition of reclamation fees on each "ton of coal produced," by interpreting "coal" to include, among other things, water that is not an inherent part of coal ("excess moisture").

NCA and MARC are filing this *Amicus* Brief because of their concern over the adverse effects on their members of these revised regulations which are extracting excessive funds from coal operators, *nationwide*. As the Eleventh Circuit has found, these regulations are national in their application. *Drummond Coal Co. v. Watt*, 735 F.2d 469, 471 (11th Cir. 1984). Title IV of SMCRA created the Abandoned Mine Reclamation Fund, 30 U.S.C. § 1231 (1982), and enacted a requirement that *all* coal operators subject to the statute pay into the fund on every ton of *coal* produced. 30 U.S.C. § 1232 (1982). Except for certain very limited exceptions, the revised regulations state that the fee collection procedures "apply to *all* surface and underground

[1]Revision of the Abandoned Mine Land Reclamation Program Rules, 47 Fed. Reg. 28,574, 28,594 (1982), codified at 30 C.F.R. § 870.12 (1985).

coal mining operations . . . ."30 C.F.R. § 870.11 (1985). (Emphasis added.)

Although this case focuses on Alabama producers, a decision in this case affects all coal producers and derivatively, the entire coal industry. This is because, although some coal producers have taken deductions for excess moisture, the others, according to the Government[2] are making payments into the Abandoned Mine Reclamation Fund based on excess moisture – payments which, NCA and MARC believe are excessive, unwarranted and the demand for which, by the Government, is illegal under the law.

Small producers may be particularly vulnerable to this unwarranted fee because the size of their mining operations make the installation of processing facilities to remove excess moisture uneconomical. MARC, in objecting to the challenged section of the revised regulations, stated to the Department of the Interior ("DOI" or "the Department") that, generally, "the price the small operators receive for their coal is adjusted downward to account for moisture and impurities. However, according to these proposed regulations, they must pay $.35 per ton for not only the coal, but for the impurities as well." Administrative Record at 67. MARC continued: "[t]his means not only are they receiving less for their coal but are paying higher taxes. . . ." *Id.*

NCA, through the Joint NCA/AMC Committee on Surface Mining Regulations, also specifically filed objections on a legal and technical basis to the challenged section of the revised regulations stating, in summary, that the challenged section was "inconsistent with the plain language of Section 401(a) of the SMCRA, Congressional intent in establishing that section of the statute, and administrative good sense." Administrative Record at 160.

In sum, therefore, NCA and MARC believe they have a vital interest, in this case, in protecting the interests of their members, *nationwide*.

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[2]Affidavit of Jane E. Robinson, Secretary's Record Supplement Exhibit D at 2-3.

ARGUMENT

I. The Coal Industry Never Considered That Water Should Be Part Of Coal For Purposes Of Calculating Reclamation Fees

The coal industry has opposed the DOI attempt to tax "excess moisture" from the time the revised regulations were proposed, in part, because the proposal was based on a flawed premise, namely that impurities, not inherent to the coal, not removed by a time certain should be deemed part of the gross weight of the coal.

A. Under common industry practice, "coal" includes inherent moisture but not excess moisture.

1. Inherent Moisture

Four basic characteristics – (1) Btu value; (2) sulfur; (3) ash; and (4) moisture – are consistently analyzed whenever coal is bought and sold. These characteristics affect price and use and no coal contract, however simple, would fail to address them. While these basic characteristics vary as widely as do the coal seams throughout the United States, the inherent quality of coal within each coal seam can be analyzed and precisely defined.

It is important to know the inherent quality of the coal in any given seam prior to mining, particularly since most coal is mined and sold under long-term contract and an overriding complicating factor is the occurrence of the unexpected. Moreover, boiler specifications are matched to coal specifications and if the coal quality, and particularly if inherent moisture proves inaccurate, it can severely affect boiler efficiency. For this reason, premiums and penalties are often inserted into contracts with respect to the inherent quality specifications.

Thus, measuring inherent moisture in the coal is not mere guesswork. It is a most important commercial factor involved in the sale and the burning of coal. It is dealt with accordingly by those who produce and those who buy coal.

2. Excess Moisture

The inherent characteristics of coal do not change from the time the coal is mined until it is burned – unless it is treated by preparation. However, most coal is exposed to water after mining and before burning and such water is commonly referred to in the coal industry as excess moisture. In a surface mine, exposure is from rainfall; in underground mines, most of which are naturally damp, additional exposure is caused by spraying coal to reduce dust levels. Excess moisture will increase for all coal during storage at the mine, during transport, and in storage at the user's site. (An exception to this may be where the coal is mined in the arid regions of the West.) The percentage increase of this kind of moisture is a function of the amount of exposure of the coal after mining to water. The amount that excess moisture contributes to the total weight of the coal is, to an extent, uncontrollable. Inherent moisture is an "impurity" integral to the fuel itself, which along with the other chemical properties constitutes "coal." Excess moisture is water that the coal is exposed to after mining. The accepted historical practice by coal operators and utilities is that coal operators are not compensated for excess moisture as part of the coal delivered to customers. The challenged section of the revised regulations ignores this common industry practice.

B. The coal industry pointed out to DOI the flawed nature of the excess moisture regulations when proposed

The Joint NCA/AMC Committee on Surface Mining Regulations ("Joint Committee") is comprised of over 180 technical, legal and financial industry experts representing coal company members of both the National Coal Association and the American Mining Congress as well as representatives from many of the state coal associations and other coal companies. The Joint Committee has technical expertise in various fields impacting on surface coal mining and reclamation including hydrology, climatology, agronomy, geology and archeology.

NCA, through the Joint Committee in its comments on the challenged section of the revised regulations pointed out to DOI's Office of Surface Mining ("OSM"), in 1982, the reasons why from the practical realities of surface coal mining and SMCRA's legislative scheme, excess moisture should not be taxed:

> Coal when extracted from the ground whether by surface or underground mining contains a number of constituents including moisture. This "inherent" or bed moisture, which adds to the weight of coal, will vary from seam to seam and may in fact vary within a single seam. After extraction, of course, coal is exposed to water from puddles in the mine or the strip pit, or from rain or, in the case of washed coal, complete immersion in water in the preparation plant. As a result, water is added to the coal in excess of the moisture it naturally contains at the time of severance in an underground or surface mine. This excess moisture adds to the weight of the coal but not its value.
>
> . . .
>
> In SMCRA, section 401(a)'s reference to basing the fee on the "value of the *coal* at the mine" indicates that Congress recognized that materials such as dirt, rock, ash and minerals that were extracted with the coal but were removed prior to sale should not be included in calculating the fee. These materials add no "value" to the coal. It is totally inconsistent with this scheme to impose a fee on water which has been added to the coal after it has been severed and which clearly does not add to the value of the coal. It is important to note that nothing in the legislative history contradicts this interpretation of section 401(a) or supports OSM's proposal to require excess moisture to be included in calculating the weight of the coal.

Administrative Record at 160, 162.

NCA and MARC strongly believe the Secretary missed or simply disregarded the central issues involving this regulatory change.

In 1982 NCA, through the Joint Committee, discussed the fact that OSM regulations in effect at the time did not require "this excess moisture be included when operators determine the weight of coal for purposes of calculating the Section 401(a) reclamation fee." Administrative Record at 161. NCA made the point, repeatedly, in those comments, that the "notice accompanying the December 11 proposals provides no explanation concerning the rationale behind this proposed change." *Id.* NCA suggested several alternatives to the proposed change but DOI rejected these alternatives, and DOI in the Preamble to the final regulations, in fact, did not reasonably substantiate either the rejection or the final rule. 47 Fed. Reg. 28,577-78 (1982).

II. Except To The Extent That Deductions For Excess Moisture Have Been Allowed, The Revised Regulations Improperly Extract Excessive Funds From All Coal Operators Paying On Excess Moisture, Violating The Balance of "Considerations" Set Forth In SMCRA

SMCRA does not allow for an expansive reading of the Secretary's power to assess reclamation fees such that he could redefine coal to include non-combustible materials. A review of the legislative history clearly shows that Congress never intended such an expansive reading and to the extent that operators, *nationwide,* already are paying on excessive moisture, or would pay in the future, the government is extracting unwarranted and excessive funds from such operators which rightfully belong to the operators.

This is a very significant fact under SMCRA. *Reflecting three congressional concerns, Congress set the fee at a level that would not burden industry, would provide sufficient funds for meeting program objectives within a reasonable timeframe and would be structured so it would not exert an inflationary in-*

fluence on the economy. H.R. Rep. No. 218, 95th Cong., 1st Sess. 137, *reprinted in* 1977 U.S. Code Cong. & Ad. News 669.

The District Court for the District of Columbia chose, however, to emphasize as "the focus of Congress' concern" the "remedial purposes of the Fund" and the court-stated purpose of "the need to rehabilitate those regions unable to absorb costs associated with surface mining." *Drummond Coal Co. v. Hodel,* 610 F. Supp. 1489, 1501 n.9 (D.D.C. 1985).

The D.C. Court of Appeals, in affirming the District Court, took a slightly different tack, recognizing that the "House Report reflects general concern, in connection with the level of the reclamation fee to be assessed, with the burden placed on the industry and consumers and with the inflationary impact of the fee" but saying that those "considerations were explicitly balanced, however, against the need to raise sufficient funds to meet program objectives." *Drummond Coal Co. v. Hodel,* 796 F.2d 503, 506 (D.C. Cir. 1986.) Finally, the Court of Appeals said: "[i]n any event, we fail to see how the general policy concerns relating to the impact on industry and consumers – even standing alone – could be dispositive of the issue before us." *Id.*

It is interesting that in emphasizing sufficient funding as a basis for allowing the rulemaking the District Court and Court of Appeals choose to ignore two facts: (1) that Congress, in enacting SMCRA, estimated how much Congress thought the reclamation fee would yield (and which was thus at least acceptable to Congress); and (2) that OSM, itself recognized this in its "Determination of Effects of Rules," when OSM stated: "[i]n 1977 Congress estimated that the reclamation fee imposed by Title IV would yield approximately $140-160 million per year *nationwide.* Current collections by OSM place that total around $200 million." Administrative Record at 34. (Emphasis added.) In fact, in fiscal year 1985 alone, the Secretary of the Interior collected over $226 million in reclamation fees from coal operators throughout the country.

It may not be surprising that collections are higher than Con-

gressional projections since Congress never intended that rock, clay, dirt, other debris or excess moisture be taxed and that is precisely the point that the D.C. Circuit failed to see. Moreover, a primary point made by Drummond, NCA and MARC has been that DOI never demonstrated that the "remedial purposes" of the Act would be undercut or that there would not be "sufficient funds for meeting program objectives within a reasonable timeframe." *DOI has only alleged that collections would be reduced.*[3]

This allegation by DOI seemingly accepted on its face as persuasive by the D.C. District Court and Court of Appeals, is completely inadequate in the face of Congressional concerns about economic burdens to the economy in general and the coal industry in particular.

Although the economic burden of this unwarranted tax on "excess moisture" varies on each operator throughout the country, the burden is a real one and is being imposed at a time when the coal industry is particularly vulnerable to cost pressures, including those that could result from unwarranted taxes. As Price Waterhouse recently pointed out in a major study of the coal industry conducted for, but not controlled by NCA, "the once characteristic rapid growth of the coal industry has slowed to a modest 1.8 percent annual rate over the past 5 years." Price Waterhouse, *The Economic Impact of the President's Tax Reform Proposals on the Coal Industry, Final Report 3* (Sept. 1985). Price Waterhouse further pointed out that:

> Competitive pressures from alternative fuels, primarily oil and gas, have resulted in significant productivity increases *and a slow decline in the real price of coal.* During the period from 1978 to 1983 productivity rose 41 percent, reflecting results from more efficient mining techniques and heavy capital investment in more efficient production equipment.

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[3]See unsupported allegation in the Preamble to the Final 1982 Rules that if moisture deductions were allowed, "such deductions could reduce fee collections by many millions of dollars *over the 15-year life of the Fund."* 47 Fed. Reg. 28,578 (1982). (Emphasis added.)

> Employment, however, fell dramatically over the same time period . . . from 224,203 in 1979 to 173,543 in 1983. Current employment is estimated to be approximately 175,000 . . . .
>
> International competitive pressures are also playing a major role in the domestic coal market. . . . In four years, total tonnage of coal exported from the United States dropped nearly 28 percent. *Id.* (Emphasis added.)

Clearly, Congressional concern over additional economic burdens was merited. To impose an unjustified and illegal tax on coal operators, *nationwide*, is to impose precisely the kind of unwarranted burden about which Congress was so concerned.

CONCLUSION

To avoid continuing a nationwide burden which flies in the plain face of the statute and explicit Congressional intent, and effect the clear balance among the various Congressional interests set forth in SMCRA, the National Coal Association and the Mining and Reclamation Council of America respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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